Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions	)	
of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	
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COMMENTS OF AMERITECH NEW MEDIA

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TABLE OF CONTENTS

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	)	
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Ameritech New Media, Inc. ("Ameritech") respectfully submits these comments in response to the Notice of Proposed Rulemaking, FCC 98-153, released in the above-captioned docket on July 10, 1998 ("Notice").[1]

I. Introduction and Summary.

Upon reviewing the history of this proceeding and the evolution of digital television ("DTV") broadcasting, one is left with the impression that the Commission's DTV policy is essentially like a locomotive that, having gathered steam, is now thundering down the tracks, out of control, with no clear indication of where it is going or when it will get there. What began as a government-sponsored effort to help American television manufacturers and broadcasters develop a high definition analog television system (which would have been completely backwards compatible with existing television receivers) in order to keep up with the Japanese,[2] has turned into an immense

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[1] *In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998).

[2] *See* Joel Brinkley, *Did Broadcasters Hoodwink Congress With False Promises About HDTV?*, THE NEW YORK TIMES ON THE WEB, September 15, 1997 (quoting Rep. Michael Oxley as saying, "It's important to note that it was the broadcasters, now some 10 years ago, who asked to pursue HDTV, lest the Japanese best us in this area.").

industrial policy designed to convert the television broadcast industry to digital technology at enormous cost to cable operators, programmers and viewers.

When advanced television was originally proposed, everyone understood it to refer to a continuation of the existing structure of the Nation's broadcast medium, but with vastly superior picture quality.[3] Then, analog technology was replaced with digital, and some began to assert that digital spectrum could be used by broadcasters to provide a plethora of services, not just superior quality pictures. Now, no one knows precisely what services will be offered over digital broadcast spectrum.[4] Nor does anyone have a clear idea of when the conversion to digital broadcasting will be complete, especially now that Congress has exempted broadcasters from any obligation to return their existing analog spectrum until DTV has achieved a market penetration of 85 percent. Moreover, no one knows whether consumers will accept or demand digital broadcast services, both because of uncertainty over what services will be offered and because of the high cost of digital receivers.[5]

Now, despite huge subsidies from the federal government (in the form of tens of billions of dollars worth of free spectrum), and government efforts to reduce the risks of rolling out digital broadcast services (by guaranteeing broadcasters that they will not have

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[3] According to Rep. Billy Tauzin, "The whole idea was that they [the broadcasters] would exhange one channel for another channel to broadcast HDTV." *Id.*

[4] Some broadcasters plan to use their digital spectrum to broadcast high definition television ("HDTV") programming, as originally intended, while others propose to broadcast multiple streams of standard definition ("SDTV") video programming or a mix of HDTV and SDTV. Still others intend to offer one or more subscription services as part of a package of multicasted signals. *See* Steve McClellan & Glen Dickson, *The lines are drawn*, BROADCASTING AND CABLE at 7 (Apr. 8, 1998).

[5] While estimates of how many people will actually pay $4,000 to $10,000 for a digital receiver vary, it seems reasonable to conclude that the numbers will not be overwhelming, particularly when it is unclear what services will be offered.

to return analog spectrum until digital broadcasting achieves an extremely high market penetration), broadcasters are worried that the digital broadcasting train may derail because of viewer disinterest. As a consequence, broadcasters have been clamoring for the Commission to enlist the assistance of the cable industry in making the transition to digital broadcasting by extending the must carry rules to digital broadcasting before the transition to digital is complete.

The broadcast industry's plan to extend the must carry regime to digital broadcasting during the transition period is, however, inconsistent with the plain language of the must carry provisions of the 1992 Cable Act, and unconstitutional. In the first place, the must carry provisions do not grant the Commission any authority to extend the requirements of the must carry regime to advanced television (*i.e.*, digital broadcast signals) before the transition to advanced television is complete. The only provision of the Act that addresses advanced television specifically provides that any new or modified signal carriage obligation associated with advanced television will attach only once a broadcast signal has been changed to conform with advanced television standards, and not during the transition period. Consequently, the Commission does not have any, much less broad, authority to define the scope of a cable operator's signal carriage obligations during the transition to digital broadcasting, or to attempt to use the must carry provisions to facilitate that transition as broadcasters have proposed.

Mandatory digital signal carriage, especially during the transition period, would also be unconstitutional under the test enunciated by the Supreme Court in *Turner Broadcasting System v. FCC*.[6] Under existing market conditions, the Commission could

[6] *Turner Broadcasting System v. Federal Communications Commission*, 117 S. Ct. 1174 (1997) ("*Turner II*").

not possibly show that digital must carry is necessary to achieve the objectives of the must carry regime, which were to preserve the existing structure of the nation's free, over-the-air broadcast medium, and promote the dissemination of information from a multiplicity of sources. Nor could the Commission show that the imposition of digital must carry requirements during the transition are narrowly tailored to the objectives of the must carry regime, and therefore do not excessively burden the First Amendment rights of cable operators and programmers. Indeed, requiring cable operators to carry the digital and analog signals of all broadcast television stations during the transition period would literally double the burdens imposed by the must carry regime on cable operators and programmers, forcing cable operators to drop numerous cable programming networks (as is feared by programmers such as C-Span, BET and others) to make room for digital broadcast signals that the vast majority of the American public will not be able to view for years to come. Accordingly, mandating carriage of digital broadcast signals during the transition period would impermissibly infringe upon the First Amendment rights of cable operators and programmers, and therefore be unconstitutional.[7]

II. The Commission Does Not Have Broad Discretion to Mandate Carriage of Digital Broadcast Signals in Order to Facilitate the Transition from Analog to Digital.

In the Notice, the Commission tentatively concludes that it has the authority to, and should, develop rules to facilitate the transition from analog to digital broadcasting

[7] Because the imposition of digital must carry during the transition period would so plainly exceed the Commission's statutory authority, and be unconstitutional under the Supreme Court's decision in *Turner II*, the Commission does not need to resolve the myriad technical, practical and other legal issues that would be raised by the extending the must carry regime to digital broadcasting during the transition. For that reason, Ameritech does not address those issues in these comments.

and to take into account the technical changes involved, including by establishing mandatory digital signal carriage requirements during the transition.[8] Specifically, the Commission reads section 614(b)(4)(B) of the 1992 Cable Act and section 309(j) of the Balanced Budget Act of 1997 (Balanced Budget Act), along with their legislative histories, to grant it broad authority to define the scope of a cable operator's signal carriage obligations during the transition period.[9] Neither section, however, directly or indirectly purports to grant the Commission such authority. The Commission's tentative conclusion is, therefore, wholly without foundation, and should be rejected.

In the first place, section 614(b)(4)(B), which is the only provision of the 1992 Cable Act that specifically addresses advanced television, does not in any way suggest that the Commission has authority to order cable operators to carry digital broadcast signals, let alone such signals in addition to analog signals, during the transition period. Rather, it simply directs the Commission to amend its rules to ensure that the quality of signal processing and carriage provided by a cable system for a broadcast station that has completed the transition to advanced television does not degrade. This provision, which is contained in a section entitled "Signal Quality," directs the Commission, "[a]t such time as [it] prescribes modifications of the standards for television broadcast signals, . . . to establish any changes in the signal carriage requirements of such cable systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations *which have been changed to conform with such modified standards*."[10]

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[8] *Notice*, FCC 98-153 at para. 13.

[9] *Id.* (citing H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. at 577 (1997) ("Conference Report")).

[10] 47 U.S.C. § 534(b)(4)(B) (emphasis added).

The statute, therefore, assumes that any new or modified signal carriage obligation associated with advanced television will attach only once a broadcast signal has been "changed to conform" with advanced television standards,[11] and not during some amorphous transition period.

The legislative history of section 614(b)(4)(B) confirms that Congress intended that section to address signal quality concerns, not to "facilitate" the transition to digital or any other type of advanced television broadcasting. Specifically, the legislative history makes clear that Congress envisioned advanced television as providing a vastly improved picture quality (*i.e.*, HDTV) and recognized that the signal carriage rules might have to be changed to ensure that cable systems maintain that quality in retransmitting television signals that have been modified to conform with advanced television standards.[12] This provision therefore was intended to ensure that cable systems do not degrade the quality of broadcast signals that have been changed to conform with advanced television standards, not to facilitate the transition to such standards. Consequently, neither the plain language nor the legislative history of section 614(b)(4)(B) suggests that the Commission has any, let alone broad, authority to modify the scope of a cable operator's signal carriage obligations during the transition from

[11] Additionally, the phrase "such broadcast signals" in section 614(b)(4)(B) refers back to "television broadcast signals," which were plainly meant to encompass the single video, analog service in existence at the time the statute was enacted. Accordingly, section 614(b)(4)(B) was not intended to expand a cable system's signal carriage obligations beyond the single video service then in existence, and contemplates only a reformatting (and therefore carriage) of the existing programming delivered in the current primary video feed.

[12] Conf. Rep. No. 102-862, 102d Cong. 2d Sess. 67 (1992) ("Subsection (b)(4)(B) provides that, when the FCC adopts new standards for broadcast television signals, such as the authorization of high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section."); S. Rep. No. 92, 102d Cong., 1st Sess. 85 (1991) (Senate Report) (same).

analog to digital in order to facilitate that transition. Additionally, they do not in any way contemplate simultaneous carriage of both analog NTSC and digital (or other advanced) signals during the transition, regardless of whether such carriage would facilitate the transition from analog to digital broadcasting. Nor do they contemplate carriage of multiple DTV video programming streams broadcast by a single television broadcast licensee.[13]

Section 309(j) of the Balanced Budget Act also provides no support for the Commission's tentative conclusion. Indeed, that section confers no authority whatsoever on the Commission. Rather, it merely establishes certain exceptions to the return of analog spectrum by the 2006 target date established by the Commission. Specifically, it provides that a station is not required to return its analog spectrum on December 31, 2006, under certain conditions, including if fifteen percent or more of the television households in the station's market are incapable of receiving digital signals over-the-air on a digital television receiver, on an analog receiver equipped with a digital-to-analog converter, or through a multichannel video program distributor (MVPD).[14]

Moreover, in enacting section 309(j), Congress expressly disclaimed any intent to define the scope of any MVPD's signal carriage obligation for digital television.[15] While Congress did indicate that the digital broadcast television must carry decision is "for the Commission to make at some point in the future," that statement cannot reasonably be

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[13] While the Commission's rules afford broadcasters the flexibility to use their digital broadcast spectrum to broadcast a single HDTV signal, multiple SDTV programming signals, or a mixture of both (47 C.F.R. §§ 73.622-624), section 614(b)(4)(B) plainly contemplates that a cable system could, at most, be required to carry a broadcaster's existing programming reformatted to comply with the Commission's ATV standards.

[14] 47 U.S.C. § 309(j).

[15] H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. 577 (1997).

construed to suggest that section 309(j), contrary to its plain language, was intended to confer broad authority on the Commission to develop rules governing a cable operator's signal carriage obligations during the transition period. Rather, it merely reflects Congress's recognition that the Commission would likely have to conduct a proceeding pursuant to section 614(b)(4)(B) to establish modified signal carriage requirements for television stations that have converted from analog to digital. The fact that Congress did not make the return of analog spectrum contingent on carriage by cable systems of digital broadcast signals, but rather on whether viewers can receive and view digital signals through some means, suggests that Congress did not intend the Commission to use the must-carry rules to facilitate the transition to digital broadcasting.

Accordingly, the Commission does not have broad authority to define the scope of a cable operator's signal carriage obligations during the transition period. Nor does it have authority to develop rules intended to facilitate that transition. Rather, the Commission has authority only to modify a cable operator's signal carriage obligations to ensure that, once a local broadcast television station has made the transition to digital, the cable operator will not materially degrade the quality of that station's primary signal in retransmitting it to cable subscribers. Consequently, any digital must carry requirements that required cable operators to carry simultaneously the digital and analog signals of a broadcast station during the transition period would exceed the Commission's statutory authority.

III. Mandatory Digital Signal Carriage During the Transition Would Be Unconstitutional.

In the *Notice*, the Commission acknowledged that any rules adopted in this proceeding would have to be "carefully crafted to permit them to be sustained in the face

of constitutional challenge."[16] Specifically, such rules must be consistent with the requirements of the First Amendment and the judicial decisions establishing the constitutional limits in this area, particularly the Supreme Court's decision in *Turner Broadcasting System v. FCC (Turner II)*.[17] As such, the Commission would bear a heavy burden to show that further interference with the First Amendment rights of cable operators and programmers is necessary to promote the objectives of the must carry provisions in order to justify any rules mandating carriage of digital broadcast signals. As the Court warned in *Turner I*, the government must "do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[18]

Ameritech believes that any extension of the must carry regime beyond broadcasters' current primary video service, and, in particular, the adoption of any requirement obligating a cable operator to carry simultaneously a broadcaster's digital broadcast signal in addition to its current analog service during the transition period would be unconstitutional under the test enunciated by the Supreme Court in *Turner I & II*.

In *Turner I*, the Supreme Court concluded that the must carry provisions of the 1992 Cable Act are content neutral regulations subject to intermediate scrutiny under

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[16] Notice, FCC 98-153 at para. 15.

[17] *Id.*, citing *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 117 S. Ct. 1174 (1997).

[18] *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445, 2471 (1994) (*Turner I*).

United States v. O'Brien.[19] Under *O'Brien*, in order to sustain a content-neutral regulation, the Government must show that it "furthers an important or substantial government interest," which is "unrelated to the suppression of free expression," and that the infringement on First Amendment freedoms is "no greater than is essential to the furtherance of that interest" (*i.e.*, that it is narrowly tailored to that interest).[20]

The Supreme Court in *Turner I* found that Congress intended the must carry provisions to serve three interrelated, important governmental interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[21] The Court concluded that, in short, Congress had enacted must-carry to "preserve the *existing* structure of the Nation's broadcast medium while permitting the concomitant expansion and development of cable television."[22] The Court remanded the case to the District Court for further proceedings because a plurality of the Court concluded genuine issues remained regarding whether "the economic health of local broadcasting [was] in genuine jeopardy and need of the

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[19] *Id.* at 2469, citing *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*").

[20] *O'Brien*, 391 U.S. at 377.

[21] *Turner I*, 114 S. Ct. at 2469 (citing 1992 Cable Act at §§ 2(a)(8), (9), and (10); S. Rep. No. 102-92, 102d Cong., 1st Sess. 58 (1991) (Senate Report); H.R. Rep. No. 102-628, 102d Cong. 2d Sess. 63 (1992) (House Report)). Ameritech notes that these statutory goals do not include the introduction of digital broadcast television and the recovery of vacated broadcast spectrum, which apparently are the Commission's main goals in this proceeding. While these may be laudable goals, and may even be important or substantial governmental interests, they are not the goals or interests that the must carry rules were intended to promote. It simply is not the case that Congress adopted the signal carriage requirements in the 1992 Cable Act to facilitate the introduction of digital broadcast television or the subsequent recovery of vacated analog spectrum. Consequently, the Commission may not rely on these goals to justify any digital signal requirements adopted in this proceeding. Rather, to sustain any such requirements, the Commission must show that they are necessary to further the specific governmental interests identified by Congress in enacting the must carry provisions.

[22] *Turner I*, 114 S. Ct. at 2464.

protections afforded by must-carry," and whether must carry "'burdens substantially more speech than is necessary to further the government's legitimate interests.'"[23]

In *Turner II*, the Supreme Court found that Congress could reasonably have concluded from the evidence before it that, absent legislative action, the free local off-air broadcast system was endangered because, without the must carry requirement, significant numbers of broadcast stations would be refused carriage on cable systems, placing them at risk of serious financial difficulty.[24] The Court also found that the must carry provisions, at least insofar as they applied to broadcasters' current primary analog service, did not burden substantially more speech than necessary to further two of three governmental interests the provisions were intended to serve (that is, preserving the benefits of free, over-the-air local broadcast television, and, therefore, promoting the widespread dissemination of information from a multiplicity of sources).[25] A majority of the Court, however, concluded that the must carry provisions were not a narrowly tailored means of serving Congress's third objective, promoting "fair competition" in the market for television programming.[26]

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[23] *Id.* at 2470 (quoting *Ward v. Rock Against Racisim*, 491 U.S. 781, 799 (1989)).

[24] *Turner II*, 117 S. Ct. at 1195, 1197.

[25] *Id.* at 1197-1203.

[26] *Id.* at 1203 ("I join the opinion of the Court except insofar as Part II-A-1 relies on an anticompetitive rationale.") (Breyer, J., concurring in part); and at 1208 ("The net result appears to be that five Justices of this Court *do not* view must-carry as a narrowly tailored means of serving a substantial governmental interest in preventing anticompetitive behavior . . .") (emphasis in original) (Connor, J., with whom Scalia, J., Thomas, J., and Ginsburg, J., joined, dissenting). Ameritech notes that the "anticompetitive behavior" about which Congress was concerned was "the ability of cable systems to retransmit local programming without copyright liability and without any responsibility to carry a complement of such signals on reasonable conditions," which it considered "both unfair and inconsistent with the balance contemplated when the compulsory license was adopted." House Report at 63. Because cable operators can no longer retransmit the programming of any broadcast station without its consent, the "promoting fair competition" rationale simply cannot support the imposition of any signal carriage obligations, let alone digital signal carriage obligations, on cable operators.

In concluding that the must carry provisions were sufficiently narrowly tailored to withstand First Amendment scrutiny, the Court relied on several factors. Most importantly, the Court found that evidence adduced on remand indicated that the "actual effects" of must carry on cable operators were "modest," with the vast majority of cable operators not affected in a significant manner by must carry.[27] The Court also relied heavily on the fact that Congress had taken a number of steps to limit the breadth and burden of the regulatory scheme on cable operators and programmers. The Court observed, for example, that more popular stations (which presumably would be carried in any event) would likely opt for retransmission consent, but would nonetheless count toward a system's must carry obligations.[28] It further noted that Congress had, *inter alia*, limited the must carry obligations of larger systems to one-third of capacity, and allowed cable operators discretion in choosing which competing and qualified signals would be carried.[29] Based on the foregoing, the Court held that the must carry provisions as then applied were not invalid on the ground that they were substantially broader than necessary to achieve the government's interest.[30]

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[27] *Turner II*, 117 S. Ct. at 1198. The Court noted in this regard that 94.5 percent of cable systems nationwide had not had to drop any programming in order to fulfill their must carry obligations; the remaining 5.5 percent had had to drop only 1.22 services from their programming; and cable operators nationwide carried 99.8 percent of the programming they carried before enactment of must carry. *Id.* The Court further observed that, of the 35,886 cable channels occupied by broadcast stations, 30,006 were occupied by stations carried voluntarily before 1992, and that the vast majority of such stations would continue to be carried even absent any legal obligation to do so. *Id.* at 1198. The Court concluded that carriage of those stations therefore did not represent a significant First Amendment harm to either cable operators or programmers. *Id.* Because the number of channels occupied by broadcast stations added due to must carry (which, the Court concluded, represented the actual burden of the regulatory scheme) approximated the number of stations that would be dropped in the absence of must carry, the Court concluded that the burden imposed by must carry was congruent to the benefits it affords. *Id.* at 1199.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1200.

Under the Supreme Court's decisions in *Turner I & II*, it is clear that the constitutional status of extension of the must carry rules to DTV would turn fundamentally on two questions: (1) whether the existing structure of the nation's free, over-the-air broadcast medium would be threatened absent mandatory carriage of digital broadcast signals; and (2) if so, whether the digital must carry requirements adopted are narrowly tailored to further the government's interests in preserving the benefits of free, over-the-air local broadcast television, and promoting the widespread dissemination of information from a multiplicity of sources. Only if both these questions can be answered in the affirmative will digital must carry withstand First Amendment scrutiny. At this time, however, there is no evidence that mandatory carriage of digital broadcast signals, particularly before the transition to digital broadcasting is complete, is necessary to preserve the existing structure of over-the-air broadcasting. Moreover, the extension of must carry to DTV would not be narrowly tailored to further the objectives of the must carry regime, particularly if cable operators are required to carry a station's analog and digital signals simultaneously, or to carry multiple DTV signals in one channel. Consequently, mandatory carriage of digital broadcast signals during the transition would be unconstitutional under *Turner II*.

a. Mandatory Carriage of DTV Signals During the Transition Period is Not Necessary to Promote the Objectives of the Must Carry Regime.

In order to withstand First Amendment scrutiny under *Turner II*, the Commission must demonstrate that any digital must carry requirement adopted is necessary to promote the statutory objectives of the must carry rules – that is, that digital must carry is necessary to preserve the benefits of free, over-the-air broadcast television, and to promote dissemination of information from a multiplicity of sources. The Commission

can not simply speculate that the economic viability of broadcast television will be threatened absent digital must carry, but rather must demonstrate that the threat is real. Under current market conditions no such showing is possible.

In the first place, no one has seriously suggested that, absent mandatory carriage of digital signals, local broadcasters will suffer serious financial harm and possible ruin, or that the existing local broadcast system would be in genuine jeopardy. Nor could they credibly do so. The reason is the broadcast television industry has thrived in recent years, with a compounded annual growth rate of 7.3 percent over the past five years.[31] The industry is, moreover, expected to continue to flourish into the foreseeable future, with financial analysts predicting a "strong, vibrant television industry even in the face of increased competition," with "some very strong years ahead of double-digit increases" in industry growth.[32] The television broadcast industry is, therefore, strong, and expected to remain so for the foreseeable future.

Additionally, even if local broadcasters are denied mandatory carriage of their digital broadcast signals during the transition, they will still be entitled to carriage of their

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[31] Broadcast Ad Group Blasts Cable Audience Claims, COMMUNICATIONS DAILY, (September 11, 1998) (citing Mark Fratrik, NAB vp-economist).

[32] *Id.* Just ten months ago, the Commission reported that the broadcast industry has continued to grow substantially in terms of the number of operating stations and advertising revenues. In its Fourth Annual Cable Competition Report, the Commission reported that the number of commercial and noncommercial televisions tations increased to 1561 as of July 1997 from 1550 as of August 1996. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, CS Docket No. 97-141, FCC 97-423 at para. 91 (rel. Jan. 13, 1998). The Commission also reported that broadcast advertising revenues reached $31.3 billion in 1996, a 12 percent increase over 1995. *Id.* Advertising revenues for the six broadcast networks alone reached $14.7 billion in 1996, compared to $4.9 billion for cable programming networks. *Id.* And, while broadcast stations' share of television audience declined, broadcasters still retained a large majority of the television audience – during the 1996-1997 season, the six broadcast networks accounted for a combined share of 68 percent of prime time viewing among all television households. *Id.* These figures certainly do not reflect an industry in dire straits and in need of government support.

existing analog broadcast signals. Consequently, they will continue to have a significant source of advertising revenue throughout the transition.

Many broadcasters will also be able to negotiate retransmission consent agreements for their DTV signals regardless of what the Commission does in this proceeding. In the first place, cable operators will carry broadcasters' DTV signals if there is sufficient viewer demand for them.[33] But even if viewer demand for such signals is low initially, many stations may, as they previously did with affiliated cable programming networks, tie carriage of their DTV signals to consent for retransmission of their existing analog signals.[34] The fact is that virtually no cable system can afford not to carry the analog signals of popular broadcast stations, such as the affiliates of major television networks (like ABC, NBC, CBS and Fox), and even the affiliates of smaller networks (like WB, UPN and PAX). Consequently, market forces alone will ensure that the DTV signals of many, if not most, broadcast television stations will be carried.[35] There is, therefore, no basis to conclude that, absent digital must carry, local broadcasters will suffer financial hardship or ruin, and therefore that mandatory carriage of digital broadcast signals is necessary to preserve free, over-the-air television.

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[33] Ameritech notes in this regard that cable operators voluntarily carried up to 98 percent of broadcast television stations before the must carry rules were adopted in 1992.

[34] A similar situation existed after the must carry provisions were originally enacted. At that time, many broadcast stations were able to demand carriage of new, untried cable programming networks (like FX, ESPN2, and America's Talking (which was subsequently replaced by MSNBC)) in return for retransmission consent to carry their broadcast signals. There is, therefore, no reason to assume that, absent mandatory signal carriage rights, most DTV signals will not be carried.

[35] The fact that many digital signals might be carried regardless of what the Commission does in this proceeding does not suggest that digital must carry would not impose a significant burden on cable operators. Unlike mandatory carriage, a voluntary carriage regime would minimize the burden on cable operators by permitting them to negotiate on a level playing field with broadcasters, and to limit the deleterious effects of digital signal carriage on cable programming networks and viewers alike.

Digital must carry also would do nothing to increase diversity in the sources of information available to viewers. Even if a station did not simulcast precisely the same programming in both digital and analog formats, the source of the programming would remain the same. And because both signals would be subject to the same editorial control, they would represent the same viewpoint, even if the programming on each signal were not identical. Ameritech observes that it is precisely for this reason that Congress enacted the must carry provisions in the first place. Specifically, Congress was concerned that, because cable operators ultimately controlled which signals would be carried on their systems, cable subscribers would not have access to diverse viewpoints, regardless of how many channels of programming were carried.[36] For the same reason, longstanding communications policies have sought to avoid control by one person over all the media voices available to a community.[37] It would be ironic, to say the least, not to mention completely inconsistent with the goals of the must carry regime, if the must carry rules, which were intended to promote diversity of viewpoints, were applied in a way that allowed broadcasters to obtain carriage for multiple channels of video programming, all of which would be subject to the same editorial control.

Moreover, to the extent the must carry rules were originally enacted in order to ensure that viewers continue to have access to locally originated programming,[38] the increasing delivery of diverse, local programming by cable systems calls into question

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[36] Senate Report at 56 ("Local signal carriage regulations ensure that cable subscribers receive a diversity of voices, not just the signals chosen by the cable operator.").

[37] *Id.*

[38] 1992 Cable Act § 2(10) (finding that "[a] primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.").

the constitutional basis for the continuation, let alone the extension to digital broadcast signals, of the must carry regime. The constitutional basis for extending must carry to digital broadcasting is further undermined if broadcasters use their digital spectrum to multicast the programming of national cable networks, as Sinclair Broadcasting has proposed to do.[39] As Chairman Kennard recently observed, "[a]s cable operators create local programming, particularly news and public affairs shows, and with almost three quarters of Americans actually paying to receive these channels, what remains that makes broadcasters unique? And is this uniqueness sufficiently tangible, demonstrable, and assured to justify requiring cable carriage?"[40] Ameritech believes that, as cable operators increasingly create local public affairs programming, little if anything remains that makes broadcast television unique. And cable operators are, indeed, rapidly expanding their offerings of locally originated public affairs and other programming. Ameritech, for example, recently launched 24-hour cable channels on its systems in Chicago, Cleveland and Columbus that provide subscribers a broad range of local informational programming, including information concerning community events, the weather, local recreation and outdoor activities, local concerts and plays, movie theatre showtimes, and

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[39] Sinclair Broadcasting reportedly intends to use its DTV spectrum to multicast up to twelve different SDTV programming streams, rather than the single HDTV programming stream originally intended by Congress. *See* Joel Brinkley, *Did the Broadcasters Hoodwink Congress With False Promises About HDTV?*, THE NEW YORK TIMES ON THE WEB (Sept. 15, 1997) ("Sinclair Broadcasting Group, which owns or provides programming for 29 television stations nationwide, [has] announced that it would forgo HDTV and offer several channels of pay TV instead."); Joel Brinkley, *Some Broadcasters Back Away From HDTV Programming Pledge*, THE NEW YORK TIMES ON THE WEB (August 18, 1997) (quoting David Smith, President of Sinclair Broadcasting Group, as saying that "Sinclair's plan would be to band several TV stations together in each city so that the group can offer 20 or 30 different pay-TV channels and become a competitor to cable"). While it is unclear where Sinclair intends to obtain sufficient programming to provide all these different streams of programming, it is likely that it will transmit programming that many cable operators already carry. In that situation, carriage of Sinclair's DTV signal would do nothing to ensure that viewers have access to local, let alone diverse, programming.

[40] Remarks of William E. Kennard, Chairman, Federal Communications Commission, before the International Radio and Television Society, New York, New York (September 15, 1998).

restaurant delivery services.[41] Cablevision Systems Corp. also recently began offering three distinct channels of local programming in the tristate area of New York, Connecticut and New Jersey, which will provide local traffic and weather, arts and educational programming customized for different regions in the area.[42] Similarly, Time Warner has established a local news channel, New York 1 News, which provides local news programming to approximately 1.1 million subscribers throughout the five boroughs of New York City,[43] and has launched a similar local news channel in Florida.[44] New England Cable News, a joint venture of Hearst Broadcasting and MediaOne, provides local news programming in New England.[45] In addition, a group of investors has launched the Florida News Channel, which will provide "hyperlocal" news content differentiated among eight zones initially (if necessary, the network could go up to 20 zones), and which will be carried by Comcast Corp. and MediaOne.[46] Because cable operators increasingly are providing diverse local programming to cable subscribers, there is no justification for expanding further the already onerous burdens of the must carry regime.

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[41] Ameritech will soon launch a similar channel on its Detroit system.

[42] Rainbow Keeps New Services Exclusive, MULTICHANNEL NEWS, July 6, 1998 at 1.

[43] John Dempsey & Gary Levin, *News Derby Upset by TV Dark Horse*, Variety, Sept. 22-28, 1997, at 1. A year ago, NCTA listed 13 local-news networks in the United States, which did not include a dozen cable channels programmed by local TV stations, such as joint ventures in six cities established by Cox Communications. *Id.*

[44] R. Michelle Breyer, Time Warner Cable to Launch All-News Channel for Austin, Texas, AUSTIN AMERICAN-STATESMAN, August 25, 1998. Time Warner plans on launching a similar channel in central Texas next spring. *Id.*

[45] *Id.*

[46] Linda Haugsted, *Florida's News Channel Finally Ready to Go*, MULTICHANNEL NEWS ONLINE, September 7, 1998.

In addition, the Commission could not demonstrate that encouraging the transition to digital broadcasting, which apparently is the Commission's primary goal in this proceeding, is a legitimate, let alone an important, government interest justifying further infringement on the First Amendment rights of cable operators and programmers, when the Commission has given no indication of what precisely cable operators will be asked to carry.[47] Ameritech submits that the Commission can not justify digital must carry if the Commission and broadcasters themselves do not know what broadcasters are going to transmit. It is simply not sufficient for the Commission to promote the business interests of one segment of the entertainment industry (that is, broadcasters), and encourage the development of what it believes will be a "neat" service, regardless of whether there is any consumer demand for that service – whatever it turns out to be.[48] Ameritech strenuously opposes the notion that broadcasters, which have received substantial government subsidies in the form of free spectrum, and which may use such spectrum for

[47] As previously noted, some broadcasters have stated that they intend to use their digital spectrum to broadcast a single HDTV signal, as Congress anticipated, while others intend to multicast several SDTV signals simultaneously, and still others intend to broadcast a mixture of HDTV and SDTV signals. Others have indicated that they will offer one or more paid subscription services as part of a package of multicasted signals. To the extent they do, the underpinnings of the must carry regime break down completely. For example, CBS Chairman Michael Jordan has indicated that CBS will "'experiment with a lot of different formats and multiplexing and other' techniques that may yield new business opportunities.'" Steve McClellan & Glen Dickson, *The lines are drawn*, BROADCASTING AND CABLE at 7 (Apr. 8, 1998). ABC Network President Preston Padden has indicated that ABC too will use its allocated spectrum for multiple business applications, although it is not yet sure what those other businesses are. *Id.* In contrast, NBC has no plans for multicasting, and intends simply to upconvert its existing programming to HDTV. *Id.* at10. And PBS plans to broadcast HDTV during prime time, but broadcast SDTV during the day so that it can transmit multiple channels of instructional programming. *Id.*

[48] As Commissioner Powell has observed, the Commission's DTV policy suffers from the problems of any industrial policy in that the transition to DTV is being driven by policy planners instead of the market, and even though consumer acceptance of DTV is unclear. COMMUNICATIONS DAILY (September 22, 1998) (quoting Commissioner Powell as stating that, "Just because something is gee whiz doesn't mean the consumers will embrace it.").

a variety of revenue-generating applications unrelated to HDTV, let alone free, over-the-air television, are entitled to additional signal carriage rights.[49]

But even if the Commission could show that converting to digital broadcasting is an important governmental interest, it could not demonstrate that digital must carry is necessary to promote that goal. There is no evidence that local broadcasters could or would not make the transition to digital broadcasting unless they obtain mandatory signal carriage rights. To be sure, broadcasters will incur substantial investment costs, as would any provider of new, risky services.[50] But that is not the same thing as saying that broadcasters cannot afford to make the transition without digital must carry. Even without mandatory carriage of their digital signals, broadcasters will continue to earn substantial revenues from advertising on their analog signals, which they can use to finance their investment in digital broadcasting. Congress has also dramatically reduced the risk to broadcasters of converting to digital broadcasting by ensuring that they will not have to return their analog spectrum until digital broadcasting has achieved a very high market penetration (*i.e.*, 85 percent).[51] In addition, broadcasters have already

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[49] Congressional leaders too are concerned that spectrum which was originally intended to provide HDTV will be diverted to other uses. Indeed, Senator McCain has been quoted as saying, "We need to find out why segments of the broadcast industry, after absolutely promising to use this spectrum, which they got for free, to make the transition to HDTV, are now reneging on that promise and planning to use this spectrum, which they got for free, for money-making endeavors instead." Joel Brinkley, *Did Broadcasters Hoodwink Congress With False Promises About HDTV?*, THE NEW YORK TIMES ON THE WEB (Sept. 15, 1998).

[50] Ameritech notes in this regard that it has made a substantial investment to design and build a cable network that directly competes with incumbent cable operators with absolutely no guarantee that it will earn a reasonable return on that investment.

[51] Ameritech notes that it took 15 years for 50 percent of American households to purchase color television sets, and 10 years for VCRs to achieve a 50 percent penetration. John Carey, *The First 100 Feet for Households, Consumer Adoption Patterns*, <<ksgwww.harvard.edu/iip/doeconf/carey.html>>. Moreover, it took personal computers, which have yet to achieve a 50 percent penetration, 16 years to reach 40 percent penetration. *Id.* As Commissioner Powell has acknowledged, the transition to DTV is likely to be even slower because of the high cost of DTV sets. WARREN'S CABLE MONITOR, September 28, 1998 at 11. Because the transition to digital broadcasting is, therefore, likely to take considerable time, and it is unclear

obtained financing for, and made substantial investments in, digital broadcast facilities without any guarantee that they will obtain digital must carry rights. There is simply no reason to assume that broadcasters will allow those investments to go to waste and fail to build out their digital broadcast facilities if they do not obtain must carry rights during the transition. Moreover, as discussed above, even without carriage, many broadcasters will be able to negotiate retransmission consent agreements with cable operators for their digital signals. Consequently, broadcasters' claims that digital must carry is necessary to encourage the transition to digital broadcasting strain credulity.

Because, under existing circumstances, the Commission can not show that digital must carry is necessary to promote the objectives of the must carry regime, let alone any other important, or indeed legitimate, government interest, it cannot, consistent with the requirements of the First Amendment, require cable operators to carry digital broadcast signals, particularly during the transition to digital broadcasting.

b. Digital Must Carry During the Transition would Burden More Speech Than Necessary.

Even if the Commission could show that digital must carry requirements are necessary to promote the objectives of the must carry regime, it is unlikely that it could also show that such requirements are sufficiently narrowly tailored to survive scrutiny under *Turner II*, particularly if cable operators are required to carry a broadcast station's analog and digital signals simultaneously during the transition period.

Unlike in 1992, the imposition of digital must carry requirements would not have only a "modest" effect on cable operators and programmers. At that time, as the

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what, if any, viewer demand there is likely to be for it, it would be grossly premature for the Commission to impose any digital must carry requirements on cable operators until the market develops further.

Supreme Court observed in *Turner II*, "the vast majority of cable operators [were] not . . . affected in a significant manner by must-carry"[52] because cable operators were already carrying virtually all local commercial broadcast stations. As a consequence, cable operators had to displace few, if any, cable programming networks to add broadcast signals. That, however, is simply not the case here.

In contrast, imposing digital must carry requirements on top of existing analog must carry requirements would, at minimum, automatically double the number of stations a cable system would be required to carry (up to the statutory maximum). And if, as is likely, a cable operator does not have sufficient channels in reserve to accommodate all those new signals, it would be forced to drop existing cable programming channels in order to make room for the additional broadcast signals. For example, if it were required to carry the digital signals of all the local commercial television stations in its service areas, Ameritech would be forced to drop 8 cable networks from its lineup in Chicago, 5 in Cleveland, 3 in Detroit, and 2 in Columbus. If Ameritech is also required to carry the digital signals of noncommerical broadcast stations, the number of cable networks that it would have to drop would increase to 10 in Chicago, 6 in Cleveland, 5 in Detroit and 3 in Columbus. Moreover, if a cable operator is required to carry digital broadcast signals on their over-the-air channels, it would likely have to install a series of traps to ensure that all viewers could view the signals, which would significantly degrade signal quality on adjacent channels, potentially forcing cable operators to drop additional programming. Consequently, imposing digital must carry requirements during the transition would significantly burden the First Amendment rights of cable operators.

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[52] *Turner II*, 117 S. Ct. at 1198.

Cable operators are not the only ones concerned about the impact of requiring cable operators to carry digital broadcast signals during the transition period. Cable networks like C-Span[53] and BET[54] have repeatedly expressed concern that they will be bumped from cable system line-ups if cable systems are required to carry the digital and analog signals of every local broadcaster in their area. Requiring cable operators to bump such networks in order to make space for each broadcast television station's digital signal would be completely at odds with Congress's goal of promoting programming diversity. Moreover, many of the cable networks that are bumped to make room for digital broadcast signals will not survive if they cannot obtain cable carriage for what will likely turn out to be a long transition period. The imposition of digital must carry requirements during the transition period would, therefore, not only be inconsistent with the objectives of the must carry regime, but also impose significant, and potentially devastating, burdens on the First Amendment rights of cable programmers and cable operators.

The imposition of digital must carry requirements during the transition also would be inconsistent with the limits on must carry adopted by Congress to minimize the

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[53] Lars-Erik Nelson, *HDTV: Not Worth Losing C-Span*, THE WASHINGTON POST, July 23, 1998 (quoting Brian Lamb, C-Span's founder, as warning Senators that C-Span and others will be bumped if cable operators have to allocate two cable channels to every over the air station because C-Span does not bring in the revenue of other cable networks). *See also* Comments of Stephen Frantzich, Professor and Chair, Department of Political Science, U.S. Naval Academy, in CS Docket No. 98-120 (expressing concern that digital must carry threatens the loss of C-Span coverage over many cable systems with limited channel capacity). As Professor Frantzich aptly observes, "[c]utting off access to C-Span in exchange for duplicative programming [for] an audience of insignificant size seems like a poorly conceived trade-off. For the bulk of the audience without digital receivers, a forest of blank channels is both a disservice and fodder for discontent. Subsidizing broadcast channels in their attempt to recapture some of their audience clearly is not in the public interest." *Id.*

[54] Ted Hearn, *Black Caucus Head Issues Must-Carry Alarm*, MULTICHANNEL NEWS ONLINE, September 21, 1998 (quoting Robert Johnson, chairman of BET Holdings Inc., as saying that networks like his were the most at risk from digital must carry). The leadership of the Congressional Black Caucus has similarly expressed concern that digital must carry "'could have a dramatic, negative impact on the diversity of cable-television programming'" because of the "potential harm to BET, BET on Jazz, and BET MoviesStarz!3." *Id.* (quoting August 17, 1998, Letter of Rep. Maxine Waters to Chairman William Kennard, Chairman, Federal Communications Commission).